

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ZACHARY SILBERSHER, et al.,) Case No. 18-cv-03018-JCS
Plaintiffs,) San Francisco, California
vs.) Thursday, December 19, 2019
ALLERGAN INC., et al.,) Courtroom G, 15th Floor
Defendants.)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOSEPH C. SPERO
UNITED STATES CHIEF MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs:

LAURA E. SEIDL, ESQ.
NICOMEDES SY HERRERA, ESQ.
Herrera Purdy Weiler LLP
1301 Clay Street, Suite 600
Oakland, California 94612
(510) 422-4700

ANDREW M. PURDY, ESQ.
BRET D. HEMBD, ESQ.
SEAN KENNEDY, ESQ,
Herrera Purdy Weiler LLP
4590 MacArthur Boulevard, Suite 500
Newport Beach, California 92660
(949) 936-0900

TEJINDER SINGH, ESQ.
Goldstein and Russell, P.C.
7475 Wisconsin Avenue, Suite 850
Bethesda, Maryland 20814
(202) 362-0636

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 APPEARANCES: (Cont'd.)

2 For Allergan Defendants:

M. SEAN ROYALL, ESQ.
OLIVIA ADENDORFF, ESQ.
Kirkland & Ellis, LLP
1601 Elm Street
Dallas, Texas 75201
(214) 972-1770

5

6

7

8

9 For Adamas Defendants:

JOHN D. W. PARTRIDGE, ESQ.
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, Colorado 80202-2642
(303) 298-5700

10

11

12

13

14

ANDREW J. HOFFMAN, II, ESQ.
DLA Piper LLP (US)
2000 Avenue of the Stars, Suite 400
North Tower
Los Angeles, California 90067-4704
(310) 595-3000

MATTHEW A. HOLIAN, ESQ.
DLA Piper LLP (US)
33 Arch Street, 26th Floor
Boston, Massachusetts 02110
(617) 406-6009

15 Transcription Service:

Peggy Schuerger
Ad Hoc Reporting
2220 Otay Lakes Road, Suite 502-85
Chula Vista, California 91915
(619) 236-9325

18

19

20

21

22

23

24

25

1 SAN FRANCISCO, CA THURSDAY, DECEMBER 19, 2018 2:33 P.M.

2 --oOo--

3 THE CLERK: We are calling Case Number 18-cv-3018,
4 Silbersher v. Allergan PLC.

5 THE COURT: Appearances, please.

6 MS. SEIDL: Good morning, Your Honor. Laura Seidl for
7 the Plaintiffs.

8 THE COURT: No -- up here. Good afternoon.

9 MS. SEIDL: I beg your pardon. Laura Seidl for the
10 Plaintiff Relator who is here with us today.

11 THE COURT: Welcome.

12 MR. SILBERSHER: Good afternoon.

13 THE COURT: Welcome.

14 MS. SEIDL: Thank you.

15 MR. HERRERA: Good morning, Your Honor. Nicomedes
16 Herrera, Herrera Purdy, for the Plaintiff Relator.

17 THE COURT: Thank you.

18 MR. SINGH: Your Honor, Tejinder Singh from Goldstein
19 and Russell also for the Plaintiff Relator.

20 THE COURT: Welcome.

21 MR. HEMBD: Good afternoon, Your Honor. Bret Hembd from
22 Herrera Purdy for the Plaintiff Relator.

23 THE COURT: Okay.

24 MR. PURDY: Good afternoon, Your Honor. Andrew Purdy on
25 behalf of the Relator Plaintiff.

1 MR. KENNEDY: Good afternoon, Your Honor. Sean Kennedy
2 of Herrera Purdy on behalf of Plaintiff Relator.

3 THE COURT: Welcome.

4 MR. ROYALL: Good afternoon, Your Honor. Sean Royall
5 with Kirkland & Ellis for the Allergan Defendants.

6 MS. ADENDORFF: Olivia Adendorff for the Allergan
7 Defendants.

8 MR. PARTRIDGE: Good afternoon, Your Honor. John
9 Partridge of Gibson, Dunn & Crutcher here on behalf of the
10 Allergan Defendants.

11 MR. HOFFMAN: Good afternoon, Your Honor. Andrew
12 Hoffman from DLA Piper on behalf of the Adamas Defendants.

13 MR. HOLIAN: Good afternoon, Your Honor. Matt Holian
14 from DLA Piper on behalf of the Adamas Defendants.

15 THE COURT: Welcome.

16 MR. HOLIAN: How are you?

17 THE COURT: I'm good. All right. So I want to -- I
18 want to talk today -- you're welcome to talk about whatever you
19 want to talk about. I want to talk about the public disclosure
20 bar issues.

21 But the first question I have is about Forest Labs whatever.
22 And I don't know whether this is -- which of the Defendants'
23 lawyers is going to address this, but if the Defendant is Forest
24 Laboratories Holdings, Ltd., all of the references in the text of
25 the motions are to generally Forest Labs, Inc., so I need a little

1 bit of back- -- what is the -- who is the Defendant and who is
2 Forest Labs, Inc. and how are they related and what's up with
3 that?

4 Well, one of you has Forest Labs, Inc., so that's the person
5 who should talk.

6 MR. PARTRIDGE: Sure, Your Honor.

7 THE COURT: No. We do argument from the podium, please,
8 because we're recording.

9 MR. PARTRIDGE: Yes, Your Honor. John Partridge, here
10 about the Allergan Defendants. The Allergan Defendants include
11 the Forest Lab entities as a result of an acquisition.

12 THE COURT: Well, stop. Stop for a second. Which -- so
13 there's a Defendant, Forest Lab something Ltd. Right? -- it's
14 Forest Laboratories Holdings, Ltd. That's a subsidiary of whom?

15 MR. PARTRIDGE: It's a -- Your Honor, I think what would
16 probably be best for our purposes today is for me to come back
17 with further information about this in terms of the particulars of
18 the corporate structure. The Allergan group entity is Allergan
19 PLC.

20 THE COURT: Right.

21 MR. PARTRIDGE: That was the entity that was dismissed
22 voluntarily by agreement with the Relators --

23 THE COURT: Right.

24 MR. PARTRIDGE: -- in Your Honor's order. That entity
25 is the over-arching umbrella entity with Forest Lab entities

1 thereunder.

2 THE COURT: Right.

3 MR. PARTRIDGE: In terms of the particulars of Ltd.
4 versus --

5 THE COURT: So -- so are there any -- what Allergan
6 entities are still in the case?

7 MR. PARTRIDGE: The Allergan entities that are still in
8 the case are -- now I'm trying to recall specifically -- Allergan
9 Sales, --

10 THE COURT: Allergan, Inc.?

11 MR. PARTRIDGE: Allergan, Inc., and then the Forest
12 Laboratories entity.

13 THE COURT: And the Forest Laboratory entity, what's the
14 relationship between that entity and the Forest Laboratories that
15 would have anything to do with these patents?

16 MR. PARTRIDGE: Your Honor, I think this is something
17 where I don't know standing here and I would need to report back
18 to you with further information.

19 THE COURT: You may know. Funny that I'm looking to
20 them to tell me, but go ahead.

21 MR. HERRERA: Your Honor, I believe that Forest Labs,
22 Inc. --

23 THE COURT: So say your name before you speak so that
24 the recording will get it, please.

25 MR. HERRERA: Thank you, Your Honor. Nicomedes Herrera.

1 THE COURT: Yes.

2 MR. HERRERA: I believe that Forest Labs., Inc. became
3 Forest Labs, LLC --

4 THE COURT: Yes.

5 MR. HERRERA: -- and that was -- that merged with
6 various Allergan entities that became Allergan Sales, LLC, --

7 THE COURT: Yes.

8 MR. HERRERA: -- which is a subsidiary of Allergan, Inc.
9 And I believe as part of the stipulation in which we dismissed
10 Allergan PLC, --

11 THE COURT: Yes.

12 MR. HERRERA: -- the Defendants had stipulated -- and of
13 course my colleague can confirm this --

14 THE COURT: Right.

15 MR. HERRERA: -- they admitted that Allergan Sales, LLC
16 is the successor-in-interest to Forest Laboratories, Inc.

17 Is that correct?

18 THE COURT: We could find that out. It's probably in
19 the record.

20 MR. PARTRIDGE: Yeah. I think that that's probably the
21 best way to approach that, Your Honor.

22 THE COURT: All right. The reason I'm asking these
23 questions is if hypothetically I get to the non-public disclosure
24 bar issues in the case, who did what matters. And so that's the
25 -- so --

1 (Pause.)

2 It says here that Allergan, LLC is the successor-in-interest
3 to the liabilities of Forest Laboratories, Inc. and/or Forest
4 Laboratories, LLC together with Forest. And Forest Laboratories,
5 Inc. is the entity that had some participation during the relevant
6 periods of time as a licensee of the patents or something like
7 that; is that right?

8 MR. HERRERA: Yes, sir.

9 THE COURT: Okay. So you all agree to that; right?
10 Counsel?

11 MR. PARTRIDGE: With respect to the Forest Laboratories,
12 LLC entity and its involvement in licensing of the '009 patent in
13 particular?

14 THE COURT: Well, Forest Laboratories, Inc. is the only
15 entity that's actually discussed in any of your briefing as doing
16 anything.

17 MR. PARTRIDGE: That's correct.

18 THE COURT: And you agree that Forest Laboratories, Inc.
19 -- the successor to Forest Laboratories, Inc. is one of the
20 Allergan Defendants; right?

21 MR. PARTRIDGE: Yes, sir.

22 THE COURT: Specifically, Allergan Sales, LLC; right?

23 MR. PARTRIDGE: Yes, Your Honor.

24 THE COURT: Okay. So as confusing as that is, let's
25 move on.

1 So I want to talk to you about the issues regarding the
2 public disclosure questions. I'm -- you know, it's -- I guess --
3 it's an interesting case, and it seems to me that there doesn't
4 seem to be any dispute that all of the material facts regarding
5 the fraud are disclosed in publicly-available materials on the
6 PAIR website in those -- in the patent prosecution files. That's
7 right, is it not?

8 UNIDENTIFIED SPEAKER: (Inaudible).

9 THE COURT: As I said several times to several of your
10 colleagues, we're going to argue from the podium because we're
11 recording this. So, actually, why doesn't everybody -- anyone who
12 wants to argue, come up to the podium. Okay? Let's just come to
13 the podium and stand. We'll do that. That will solve this
14 problem.

15 So you think there are material facts regarding the fraud;
16 that is to say, the fraud on PTO, which are not in the patent
17 prosecution history?

18 MR. SINGH: No, Your Honor. We think -- we would
19 concede that the relevant information from which the inference of
20 fraud could be drawn is in the --

21 THE COURT: Okay. Well, that was my only question. And
22 so the -- the questions that arises are whether that source is a
23 report within the meaning of the statute and whether or not, if it
24 is a report, the Relator is an original source anyway.

25 MR. SINGH: That's correct, Your Honor.

1 THE COURT: Am I right on the train of thought?

2 MR. HOFFMAN: I think you've already got it correct,
3 Your Honor. This is Andrew Hoffman on behalf of the Adamas
4 Defendants. A reference was made to the PAIR database and whether
5 the available material facts were there from which someone could
6 make an inference of fraud. We certainly agree that all of the
7 material facts are on the PAIR database and that qualifies as a
8 federal report under the public disclosure bar.

9 But as to the Adamas Defendants, actually explicit- --
10 there's no need for an inference. Every explicit allegation of
11 fraud that appears in Mr. Silbersher's amended complaint is copied
12 and pasted --

13 THE COURT: Well, it doesn't matter whether it's an
14 inference. For purposes of this statute, it doesn't matter
15 whether it's an inference or not.

16 MR. HOFFMAN: I think --

17 THE COURT: If you can draw an inference from facts in
18 a public disclosure, then the case goes away unless there's an
19 original source. It doesn't matter whether it has to be inference
20 or whether it's specially set there or whether or not they've laid
21 it out in a complaint because they have the counterclaims by
22 Amneal and Amerigen; right? It doesn't matter. So I'm going to
23 focus on actually what matters.

24 MR. HOFFMAN: Absolutely you're correct that the
25 inference is broad. The material facts are not the trigger.

1 THE COURT: There you go. Okay. So then the question
2 is: You know, is -- there's -- is -- because if that's the case,
3 we get past the substantially similar transaction step and we move
4 on to whether it's a federal report, and that is I think the
5 question I want you to talk the most about. It is the toughest of
6 the questions since no one's decided it.

7 You know, there is the *Schindler* case. Obviously, we start
8 with that. It is not quite on all fours. It is a case where --
9 I'm sorry -- where there actually was a -- a person who went
10 through documents and had to do -- figured out what the documents
11 were and had them produced in the course of a FOIA exam that -- it
12 doesn't talk a lot about it, but they had to figure out whether
13 they were disclosable under the exemptions in FOIA, etc., etc.

14 This is not quite that case. And that case came from a
15 federal employee. I guess the Court rejected the idea it had to
16 be some agency. It could be a federal employee. This is not
17 quite that because this is a -- a database that's maintained by
18 the PTO, but it's self-accessed.

19 A person can go on it, go to the public site and type in some
20 words and search it and find what they want to find. It's -- and
21 the question is whether or not it's -- that is a distinction which
22 is meaningful.

23 The cases that are closest to giving us some hint as to when
24 it's -- whether it's meaningful are the SEC cases where courts
25 have held pretty uniformly that SEC filings are reports within the

1 meaning of this act, even though they're filed by -- not by a
2 government. They're made available to the public, fulfillment of
3 the statutory obligation by the Securities and Exchange
4 Commission, which doesn't make every filing available but, as
5 guidance in this statute about what it's supposed to -- must make
6 public, those cases seem to pretty uniformly hold that those are
7 reports within the meaning of the statute.

8 Why should this be any different?

9 MR. SINGH: So, Your Honor, again I'm Tejinder Singh for
10 the Plaintiffs.

11 THE COURT: Yes, Mr. Singh.

12 MR. SINGH: I'd like to take you just a step back to the
13 text of the statute and to talk about the *Schindler Elevator* case.

14 THE COURT: Uh-huh.

15 MR. SINGH: Because it is important to understand that
16 the *Schindler* case decided in 2011 was construing the prior
17 version of the public disclosure bar.

18 THE COURT: Yes.

19 MR. SINGH: And in 2010, Congress made significant
20 amendments to it. And it would actually be helpful if you have in
21 front of you the text of the statute. The --

22 THE COURT: I do.

23 MR. SINGH: The new provision -- I'll start with
24 subsection (i) says, The public disclosure exists if the
25 disclosure occurred "in a federal criminal, civil, or

1 administrative hearing in which the Government or its agent is a
2 party."

3 THE COURT: Well, that's not this.

4 MR. SINGH: That's correct.

5 THE COURT: And the only change there is "in which the
6 Government or its agent is a party."

7 MR. SINGH: That is the -- there are two changes. One
8 is it has to be federal and the Government has to be a party. In
9 the prior version of the statute, it said if there was a public
10 disclosure in a criminal, civil, or administrative hearing.
11 Period.

12 And so the two changes Congress made are significant, and I
13 just want to piece through how they interact with *Schindler*
14 *Elevator*.

15 THE COURT: Well, but none -- none of those changes have
16 to do with reports.

17 MR. SINGH: I think they do, Your Honor. So the way we
18 would explain this is the best analogy, the way to understand
19 this, is to think about the PACER system. The PACER system is a
20 website maintained by the Government on which the Government -- or
21 on which the public can access information about what's going on
22 in courts under the very broad understanding of what is a federal
23 report that the other side is pressing, that which gives
24 information that's done by the Government --

25 THE COURT: Well, that which gives information done by

1 the Government. That which gives information done by the
2 Government under a duty by statute to make public, etc., etc.

3 So it's not just.

4 MR. SINGH: So -- okay. I want to be clear about it.

5 THE COURT: But so what? You're not making sense. You
6 said that something in these changes to a different subsection of
7 this statute makes reports narrower than I'm thinking about.

8 What is it about the change that --

9 MR. SINGH: That's correct, Your Honor. So here's how
10 I would put it. And *Schindler Elevator* supports this inference.
11 If you recall in *Schindler Elevator*, the Supreme Court was quite
12 emphatic that when you construe what a report meant, you should
13 look at all the sections.

14 And it said -- when I see the words "news media," I think of
15 breadth? Right? "News media" seems broad, so we're going to
16 construe reports broadly. That was part of the reasoning of
17 *Schindler*.

18 However, --

19 THE COURT: So that's "news media."

20 MR. SINGH: No. That's correct. However, we should
21 also look at the changes to subsection (i) because -- so I'll just
22 say if it is true -- so take as this premise that if a report
23 could encompass PACER, that would have to be wrong because it
24 would swallow exactly what Congress was trying to accomplish in
25 changing subsection (i).

1 I think the same holds true for PAIR. PAIR, Your Honor, is
2 effectively the docket sheet for the administrative hearing in
3 which the Government is not a party. So if the reproduction of a
4 civil litigation --

5 THE COURT: Well, I'm not sure that's right -- the
6 Government is not a party? I mean, I have to think about that.
7 I think you're probably wrong. The Government is a party. PTO --
8 it is -- it is a -- they file something. I appreciate this.

9 So why are SEC cases -- why is this distinguishable from the
10 SEC cases?

11 MR. SINGH: I'd be happy to talk about it. It flows
12 from this argument that I'm making now, though. So just to be
13 clear, the essential premise of our strongest argument is that
14 PAIR is to patent prosecution what PACER is to civil litigation.
15 And if civil litigation in which the Government is not a party
16 can't be swept in as federal reports because PACER exists --

17 THE COURT: No. Maybe it can.

18 MR. SINGH: I don't think so, Your Honor.

19 THE COURT: No one's ever held that it doesn't.

20 MR. SINGH: The other side has quite emphatically
21 disclaimed that possibility. Because if it were so, Your Honor,
22 just think about this. Look again at romanette (i) -- "A federal
23 criminal, civil, or administrative hearing in which the Government
24 or agent is a party."

25 The language in which the Government or agent is a party

1 would effectively be read out of the statute if every docket sheet
2 for every federal and criminal case or administrative hearing was
3 itself a federal report. There would be no point to adding that
4 exclusion.

5 And Congress did so quite deliberately.

6 THE COURT: Well, it's different because it's -- it
7 would be more limited. You're probably wrong about criminal and
8 I'm sure you're wrong about administrative hearings, but you're
9 probably right about civil cases.

10 MR. SINGH: Right. So --

11 THE COURT: Because PACER is just civil.

12 MR. SINGH: -- it includes all civil litigation, Your
13 Honor, at a minimum, at a minimum. And certainly a lot of
14 criminal cases are on PACER. Certainly a lot of administrative
15 hearings have their own docket sheets.

16 And here's the essential feature of the docket sheets --

17 THE COURT: It's not about the docket sheets; right?
18 It's about the documents.

19 MR. SINGH: I -- but the documents are available through
20 the docket sheets --

21 THE COURT: Some are.

22 MR. SINGH: -- as on PACER.

23 THE COURT: Well, not always. In many criminal cases,
24 they're not.

25 MR. SINGH: Well, let me put it this way, Your Honor:

1 The other side is not arguing -- and I think they could not argue
2 -- that, for example, the Amneal answer that Adamas put so much
3 weight on is itself a federal report because you can get it off
4 PACER.

5 THE COURT: Right.

6 MR. SINGH: In fact, they have disclaimed that argument
7 in their reply brief. Now -- and I think PAIR works the same way
8 for the PTO. It really just shows you the docket sheet of the
9 prosecution.

10 And here's the important point, Your Honor.

11 THE COURT: Well, so why is that different? PACER is
12 actually a record of federal civil hearings, lawsuits. It's -- it
13 is -- PAIR is not.

14 MR. SINGH: It's not a record of a lawsuit, but it is a
15 hearing, Your Honor.

16 THE COURT: There's no hearing.

17 MR. SINGH: I think the -- in *A-1 Ambulance*, the Ninth
18 Circuit said, "Hearings in this context really means any kind of
19 proceeding, not just a hearing as we would understand it."

20 It's plainly an administrative proceeding that's conducted.
21 And to your point -- you asked about whether the Government is a
22 party -- I just want to be clear about one thing.

23 THE COURT: Yes.

24 MR. SINGH: The Defendants have not argued otherwise.
25 They surely could have, but they have not made that argument.

1 THE COURT: No, but why isn't it true?

2 MR. SINGH: Because the Government is acting, Your
3 Honor, in the stance of an adjudicator. In the same way that you
4 are not a party to this litigation, even if, Your Honor -- even if
5 we had, for example, an ex parte proceeding where I came before
6 you and I --

7 THE COURT: Well, describe for me a federal
8 administrative hearing in which the United States is a party.

9 MR. SINGH: The SEC could bring enforcement proceedings
10 in an administrative context. The FTC can bring enforcement
11 proceedings in an administrative posture. There are lots of
12 scenarios in which the Government is indeed a party to
13 administrative proceedings.

14 THE COURT: Uh-huh.

15 MR. SINGH: It happens all the time that they adopt an
16 adversarial posture and they effectively, you know, litigate in
17 the administrative forum. But this is not one of those. The
18 Government is effectively an adjudicator.

19 And I would say, Your Honor, as I was saying, just as you are
20 not any of our counterparties, even if I appeared before you in an
21 ex parte posture and asked for a temporary restraining order, no
22 one would say that because you are the person probing my arguments
23 that you become the party.

24 THE COURT: No, no.

25 MR. SINGH: And that's exactly what a patent prosecution

1 is like. The applicant shows up and says, "I'm applying for this"
2 in the same way you might apply for a license or something else.
3 And the Government is being an adjudicator in the same way you
4 might get a Government contract or a Government benefit. The
5 Government is not a counterparty in those situations.

6 THE COURT: Uh-huh.

7 MR. SINGH: And it's not in the -- for PAIR. And I just
8 want to be clear that all that PAIR is, as you described it quite
9 correctly, Your Honor, a recitation of what went down during
10 patent prosecution. That's what it shows you. When you go to the
11 website, you will input the name of the patent application or the
12 patent you want to know about and then it will show you the image
13 file wrapper. An "image file wrapper" is a synonym for "docket
14 sheet." It is just chronologically arranged every document that
15 was filed during patent prosecution. And then some of those
16 documents you can click on a hyperlink and pull an image and look
17 at them; right? It is indistinguishable functionally from PACER
18 except it's a lot harder to use.

19 THE COURT: Well, but it is functionally the same from
20 all relevant points of view as FOIA. Here's my argument about
21 that. Can't the United States decide that it wants to meet its
22 statutory obligation by making disclosures to the public and
23 having an electronic system for the public to access those
24 disclosures?

25 So, for example, you could have -- you know, the FOIA request

1 to X agency. X agency could put all of its documents online in an
2 effort to comply with FOIA, allow people to come online, make a
3 search for the ones that are required and made public, and then
4 they get them.

5 Why does it matter that it's this electronic version as
6 opposed to the mechanical version that was at issue in *Schindler*
7 *Elevator*?

8 MR. SINGH: So I see -- I see you're characterizing this
9 as essentially wholesale FOIA; right? -- as opposed to responding
10 to an individual request with a written response. They make a
11 website that puts everything out.

12 THE COURT: I don't know that it's wholesale. It's the
13 Government -- how the Government decides to get ahead of it and
14 get ready for satisfying its obligations.

15 MR. SINGH: I do not think, Your Honor, that if the
16 Government, for example, transmitted the message in *Schindler*
17 electronically as opposed to on paper, it would have changed the
18 result.

19 However, I do think that when you talk about whether
20 something is a federal report, it is -- it is critical to pay
21 attention to what Congress was doing in 2010. So if we are right
22 -- and we are -- that in 2010, one of the principal objectives
23 Congress had was to facilitate more False Claims Act suits by
24 stripping out civil, criminal, and administrative proceedings in
25 which the Government is not a party, it would be utterly contrary

1 to that intent to construe a different provision of the public
2 disclosure bar to pull that in.

3 Now, to be clear, that point can be taken too far, and I want
4 to illustrate why I think we're on the right side of any line. If
5 the New York Times showed up to the *Amneal* case and wrote an
6 article about the contents of the answer, we -- they would be
7 right that, you know, that's publicly disclosed in the news media.

8 THE COURT: Well, it's the news media.

9 MR. SINGH: However, in this situation all you have is
10 you have the PAIR docket, which I will say is part and parcel of
11 the hearing itself, in the same way that the docket sheet for
12 civil litigation is part and parcel. It is a docket that has no
13 independent significance; right? That is, the Government is not
14 producing a report pursuant to some other thing.

15 THE COURT: Well, no. That's not entirely correct.
16 Because I know about those dockets, as you do. They pick -- they
17 screen for what will be publicly disclosed. So it's not
18 everything that comes in. It's not everything. So -- and -- so
19 that's my worry about this, is that it actually is a mechanism
20 whereby the Government has chosen A, not B. You know, there's a
21 private docket. There's a confidential docket. There's a public
22 docket. There's a number of things.

23 MR. SINGH: That's true, but that would also be true, I
24 think, of PACER; right? -- where certain materials are filed under
25 seal or similar -- there's an amount of selectivity that goes into

1 what gets disclosed on the public docket sheets. That's quite
2 common practice in all these scenarios. And I don't think it
3 would make much legal difference.

4 I think the question that you should ask, Your Honor, is: As
5 I look at PAIR, is what I'm looking at simply part and parcel of
6 the administrative hearing that is excluded from the scope of the
7 public disclosure bar, or is it something independent from it?

8 And this gets to my answer to your question about SEC
9 reports.

10 THE COURT: Independent from it. Why do you think it
11 has to be independent? Where -- what case are you drawing on that
12 it has to be independent from it?

13 MR. SINGH: Because, Your Honor, if it weren't, then it
14 would get to the problem that I identified earlier of being
15 contrary to Congress's intent to take those proceedings out of the
16 game.

17 THE COURT: Well --

18 MR. SINGH: Right? If it would not be the case, right,
19 there is just no way to look at it and say the proceeding, the
20 administrative proceeding, is not a public disclosure, but all of
21 the documents in the administrative proceeding are public
22 disclosures because, as part of the proceeding, the PTO creates
23 this.

24 And so you should ask if it's independent.

25 THE COURT: Well, although --

1 MR. SINGH: And then the SEC --

2 THE COURT: Although -- although Congress wasn't
3 thinking about those things. They weren't thinking about that
4 distinction that you're drawing now. There's no evidence that
5 they had that in mind. So it may be that there are other parts
6 of, as you say, the news media which may sweep away pieces of the
7 first section because -- because the report is supposed to be so
8 broadly --

9 MR. SINGH: But those things are done independent of the
10 proceeding itself. There's nothing inherent to patent prosecution
11 that causes the New York Times to report on it. There is nothing
12 inherent to civil litigation that causes the New York Times --

13 THE COURT: Well, no, but I'm not --

14 MR. SINGH: -- to report on it.

15 THE COURT: I'm not talking about the news media. I'm
16 talking about in general Congress was not doing what you are
17 doing. They didn't say, On the other hand, if it falls within
18 reports, we're not including it if it's just part and parcel of
19 the administrative proceeding. It's got to be something
20 independent of the administrative proceeding.

21 That's something you've brought up, but Congress didn't think
22 of that. That's a distinction you've brought up.

23 MR. SINGH: Your Honor, it's quite well-settled I think
24 that when we do statutory interpretation, we do so in an attempt
25 to harmonize various parts of a statute to give each portion --

1 THE COURT: Of course. This is how you're trying to
2 harmonize that.

3 MR. SINGH: And those are the background assumptions
4 against which Congress legislates. And I think that when Congress
5 does something so deliberate as narrowing the scope of the
6 hearings that are going to be included, it would not be correct to
7 read the statute to undo that in a different section.

8 THE COURT: Okay.

9 MR. SINGH: And I think that's just a critically
10 important point, and this does -- I do want to make sure I answer
11 your question about SEC reports.

12 THE COURT: I hope so.

13 MR. SINGH: Because those reports are not part of some
14 administrative proceeding or hearing. Those reports are an
15 independent "reporting obligation" and they are put out pursuant
16 to that obligation, which is quite distinct, Your Honor, from
17 what's going on in the context of PAIR or PACER. We can -- you
18 can distinguish those cases.

19 Now, I will also say that although you characterized those
20 cases as holding somewhat uniformly in that result, there's not a
21 lot of analysis in most of those cases. It's not clear how
22 thoroughly these issues were ventilated and most of them arose
23 under the prior version of the statute. And so when Congress has
24 subsequently narrowed it, there is a real question about whether
25 those cases would still be decided the same way today.

1 But what I'm saying to you is even if they would be, I do
2 believe that they are quite distinguishable. And also as more --
3 as case --

4 THE COURT: I bet with this U.S. Supreme Court, they
5 could decide this.

6 MR. SINGH: As more case support for what I'm telling
7 you, we cited in our briefs to the *Integra Medical* decision.

8 THE COURT: Uh-huh.

9 MR. SINGH: And that was -- that made the exact argument
10 that I'm making about PACER.

11 THE COURT: Yes.

12 MR. SINGH: It made it in the context of construing the
13 term "news media" to not mean every website, including PACER. But
14 of course the logic applies with equal force to federal reports
15 because Congress would not give with one hand and take away with
16 the other in this context.

17 And I think that the animating purpose of the 2010 amendments
18 was narrow the public disclosure bar so that more meritorious
19 suits can be brought. And it's important to realize --

20 THE COURT: And of course -- but the argument on the
21 other side, apart from disagreeing with your statutory
22 construction from the beginning is, well, they just -- they
23 changed romanette (i). They didn't change romanette (ii). And so
24 if they wanted to change romanette (ii), they could have changed
25 romanette (ii), but they didn't.

1 MR. SINGH: Well, they did change it. They changed it
2 from saying -- it's a difference that may not matter to this
3 precise question. But they added the word "federal." So they
4 said "or other federal report." And I think that what you could
5 say --

6 THE COURT: Yes.

7 MR. SINGH: -- is based on that, the -- and this goes
8 again to the SEC questions -- that what you need to be looking at
9 is not necessarily reports to the Federal Government, but reports
10 by the Federal Government, such that simply regurgitating
11 automatically information given by a private party may not qualify
12 as a federal report after the 2010 amendments.

13 Now, I know these propositions are all debated. I don't
14 think that any of these arguments is so plainly obvious that the
15 opposition is frivolous.

16 THE COURT: Right.

17 MR. SINGH: On the other hand, I do think we have by far
18 the better reading of the statute here because there is no good
19 way to draw a bright line between PAIR and PACER. And I think if
20 you look at their briefs in this case, they have run away as fast
21 as they can from the idea that their rule would sweep in PACER.
22 But for the life of me, I cannot figure out how they would avoid
23 that result.

24 THE COURT: Well, we'll ask them now.

25 MR. HOFFMAN: We never talked about PACER. We don't

1 argue that PACER's a federal report.

2 THE COURT: He says you are essentially arguing that
3 PACER is a federal report. Even though you don't say that, with
4 respect to an administrative hearing that has its own PACER, a
5 federal administrative proceeding which the United States is not
6 a party, it's the exact same thing.

7 MR. HOFFMAN: PACER sweeps in so much more information
8 than just information about proceedings where the United States is
9 a party. The patent PAIR website is limited exclusively to
10 information that was disclosed to the United States Government.
11 They were aware of -- all of this information was available to the
12 United States and by -- by federal regulation, 37 CFR 1.11(d),
13 patent prosecution histories are matters of public record.

14 THE COURT: What's that got to do with anything? You're
15 not answering my question. He's saying -- you're not actually
16 addressing the question. PACER is with respect to lots of things
17 that the Government is not a party, a report that the United
18 States puts up, the Federal Government puts it up. There's a
19 federal statute that makes the courts put it up. There are rules
20 about what gets put up. The reports are all in there.

21 Why isn't that the same as this?

22 MR. HOFFMAN: It's different because PACER -- PACER is
23 not coextensive with what's going on in terms of proceedings
24 involving the United States Government.

25 THE COURT: Of course not.

1 MR. HOFFMAN: But PAIR --

2 THE COURT: Of course not, but --

3 MR. HOFFMAN: -- is, so we know the Government --

4 THE COURT: No. No. You're not taking the position
5 that the Federal Government is a party to a proceeding before the
6 PTO, are you?

7 MR. HOFFMAN: That's not -- that's not our position
8 here. We are relying on the federal report prong of the public
9 disclosure bar which is --

10 THE COURT: Okay. So they're -- if they're not -- well,
11 I know, but if they're not party, so it's not just proceedings
12 against the United States. That's not what it is. So you're
13 still not -- you're still not getting it. You're still not
14 getting it. What is this difference from -- how is this different
15 from PACER? PACER is just like the PTO's website. You've got --
16 one's an administrative proceeding. One's in court. Okay?

17 And one is -- there's a statutory obligation to make it all
18 public and they do it through the PACER website. There's a
19 statutory obligation to the PTO with respect to the documents that
20 are actually filed in the public domain on PAIR to do that as
21 well.

22 So far, we're exactly the same. But you're not arguing that
23 -- but -- those seem to be identical.

24 MR. HOFFMAN: Well, it's possible -- it's possible that
25 PACER is a federal report. We haven't been advancing that

1 argument.

2 THE COURT: No, no. So if you try to advance that
3 argument, then he's going to attack you because it will be -- the
4 arguments you have to address here is why isn't your argument
5 directly contradictory of romanette (i)? That's his argument.

6 MR. HOFFMAN: Yeah. But we're not invoking on the --
7 we're invoking romanette (ii).

8 THE COURT: No, I understand that, but his argument is
9 -- I guess that is an argument. I'm not sure how good an argument
10 it is. But Congress came out and said, This is too broad. We
11 don't want disclosures. We used to have disclosures in things
12 where the Federal Government was not a party. Right?
13 Administrative proceedings like this -- this is an administrative
14 proceeding. We used to. We're not going to have that anymore if
15 it's -- unless the United States or its agent is a party.

16 Why doesn't your construction of "report" contradict that?

17 MR. HOFFMAN: The question there is -- I think it's
18 perfectly reasonable for Congress to decide that for the purposes
19 of roman (i), where you say, We want to limit the types of
20 proceedings that will trigger the public disclosure bar, it's
21 based on where can we be reasonably confident that the Government
22 would actually -- might come across this information. Right? And
23 so they made changes to that part of the statute.

24 We don't have to worry about whether or not the information
25 on public PAIR might sneak by the Government, especially not with

1 respect to the Adamas Defendants here.

2 THE COURT: Okay. But this isn't about that -- there's
3 lots of case law that says that's an irrelevant consideration in
4 deciding this question. But it also doesn't make any sense to me.

5 What is left of the romanette (i) civil if you're right about
6 romanette (ii)?

7 MR. HOFFMAN: What's left of romanette (i) is that it's
8 still any of the proceedings that occur where the United States is
9 not a party.

10 THE COURT: It's not because your argument goes right to
11 PACER. Your argument says PACER is a report where there's an
12 obligation to produce it and it's a Federal Government --

13 MR. HOFFMAN: Did you say "Siri"?

14 THE COURT: I didn't -- I did not say "Siri." I did not
15 say "Siri." Report -- if we find a report, we would have the
16 answer.

17 No, but my point is this: Congress limited in romanette (i)
18 that the records which one could consult and still -- and not use
19 them in a *qui tam* action, or included cases in which -- civil
20 cases in which the Government is a party. Okay? That's romanette
21 (i).

22 Okay. Your construction of romanette (ii) takes that away
23 because if every report on PACER -- every report on PACER is
24 included, then even though you've excluded them under these cases
25 under (i), you get them back in under (ii).

1 MR. HOFFMAN: I think it's entirely, Your Honor, a
2 question of notice to the Executive Branch. And there's no notice
3 to the Executive Branch of reports on PACER for cases that don't
4 involve the United States as a party. With the PAIR database, we
5 -- we can rest assured that it was submitted to the U.S. Patent
6 and Trademark Office.

7 THE COURT: So that's really clever and very exciting
8 and doesn't interpret the statute. So I'm asking you a very
9 direct question. So what you're saying is, "Yes, Judge. You're
10 right. Congress eliminated the word 'civil' from romanette (i)."

11 MR. HOFFMAN: Congress -- with romanette -- I don't know
12 what Congress did to romanette (i), but I don't think --

13 THE COURT: When they said civil -- limiting civil to
14 cases in which the United States or its agents is a party as those
15 which are a public document, by including PACER in (ii), then that
16 means if you can find it anywhere on PACER, whether or not the
17 United States is a party, it's a litigation, whether or not the
18 United States is a party, it is a forbidden source for a *qui tam*
19 action.

20 MR. HOFFMAN: We would say that amendments to roman (i)
21 didn't change roman (ii). Congress did make change to roman (ii)
22 as opposing counsel acknowledged. They knew they could -- they
23 could have amended the statute in a way that they would prefer,
24 but it's not that way. We've got binding guidance from the United
25 States Supreme Court in *Schindler Elevator* that says you read that

1 report prong extremely broadly to mean anything that gives
2 information or any formal or official statement of facts in
3 proceedings involving a federal agency. I don't know how we get
4 around *Schindler*. Every single case decided in the aftermath of
5 *Schindler* in the intervening decade, every court has held that
6 formal written submissions to federal agencies, such as the SEC or
7 the FDA, those formal written submissions are federal reports
8 under Part 2 of the public disclosure law.

9 It -- the case law is unanimous. The SEC filing cases that
10 you mentioned are -- are very persuasive I think on this score.
11 There's no alternative line of cases that support the line of
12 argument that counsel for the other side is advancing.

13 And, honestly, this case is even a little easier probably
14 than *Schindler Elevator*. *Schindler*, the question was: Well, what
15 really is public -- you know, is it public when -- you know, when
16 there's FOIA and does a gatekeeper decide if it's public or not.

17 With patent prosecution records that are posted to public
18 PAIR, you don't need the gatekeeper. As you rightly noted, the
19 Agency is abiding by a regulatory obligation to disclose
20 everything. It is public.

21 THE COURT: Well, there's not -- it wasn't produced --
22 *Schindler* is easier because it was clearly a report by someone in
23 the United States Government. So --

24 MR. HOFFMAN: The SEC -- the SEC filing is an example of
25 -- every --

1 THE COURT: Well, and the Supreme Court hasn't touched
2 on that yet, but we'll see where that goes. But it's an
3 interesting problem. So what you're saying is -- Yes, you're
4 right, Judge. He's right -- that what Congress ended up buying
5 off on is that despite the language of romanette (i), if someone
6 finds anywhere in PACER information, they can't use it to file a
7 *qui tam* action?

8 MR. HOFFMAN: We haven't argued that.

9 THE COURT: I know you haven't argued that, but that is
10 the necessary implication of -- you would agree that there's no
11 material distinction with that respect; right?

12 MR. HOFFMAN: I accede to Your Honor on the point.

13 THE COURT: Okay. Great. I'm not sure what it gets me,
14 but it's just as well. It's bizarre. It's bizarre.

15 Because my instinct is yours, frankly, that Congress did a
16 very narrow thing in a case where the Supreme Court had
17 interpreted very broadly the word "report" already, in which --
18 after that, the Supreme Court interpreted it very broadly. I
19 don't -- I don't know that just because there is this very broad
20 interpretation of what "report" means that Congress's narrow
21 change to the previous subsection means that I interpret "report"
22 differently. That's your argument you two. I guess I understand.

23 MR. ROYALL: Your Honor, could I be heard?

24 THE COURT: Sure. If you have something important to
25 add.

1 MR. ROYALL: I don't know how important it is, but --

2 THE COURT: Only add things that are important.

3 MR. ROYALL: Adamas' counsel acceded to your position.

4 I'm not sure of what.

5 THE COURT: He doesn't either.

6 MR. ROYALL: For the record -- excuse me -- this is Sean
7 Royall for the Allergan Defendants. The one thing I would note --
8 I have not studied PACER carefully, so I don't know that I'm
9 prepared to say -- or take a position on whether we view them as
10 indistinguishable.

11 The one thing I would say that we -- in preparation for this
12 hearing that we did look at carefully is whether we saw any
13 distinction between PAIR and EDGAR, the SEC site, which is the
14 subject of those cases that have found EDGAR to be a government
15 report. And one thing that we noted as we looked at that question
16 is that there are government regulations -- and you may have
17 alluded to this earlier -- but there are government regulations
18 that not only require the PTO to publish this information but also
19 establish a process by which the agency -- a process the agency
20 must follow, including provisions saying that the Director of the
21 PTO has some discretion in determining what materials are and are
22 not published. And that's -- the cite I have is 35 U.S.C. 122.

23 THE COURT: Sure. Let me ask you a question about EDGAR
24 because I haven't done securities law since I became a judge other
25 than when the judges do so, we have to look at EDGAR.

1 EDGAR -- what I know about it is the companies file their
2 10-Ks and their 10-Qs and their this and their that on it. Do
3 they file any applications to the Securities and Exchange
4 Commission for an action? You know, is there a -- when they --
5 when they want to file for approval of a proxy statement, do they
6 file that application on EDGAR? When they want to file for -- you
7 know, what I'm trying to figure out is is this distinction
8 meaningful or what? Because what Counsel says is that in an SEC
9 case, it's not -- it's not an administrative proceeding. All it
10 is is you're filing a report because you're obligated to file a
11 report and it's obligated to be public.

12 It's very clear that proceedings before the PTO we can
13 reasonably characterize as some kind of administrative proceeding
14 because there's a -- they're applying for something and they're
15 going back and forth and that sort of thing. Is there anything in
16 EDGAR other than just filing naked reports?

17 Come on, somebody at Gibson Dunn or somebody must be a
18 securities lawyer. I don't know.

19 MR. ROYALL: I don't have a definitive answer to that,
20 Your Honor. It's a good question. But the point that -- one
21 point I was making is it may be a case of distinguishing PAIR and
22 PACER that there is delegated discretion to the Director of the
23 PTO to curate, if you will, or organize and determine what is and
24 isn't published on the public PAIR where that doesn't exist with
25 PACER and PACER is more of a -- just an automatic republication of

1 things that are -- and that may be a distinction of matters given
2 other things that arise in the case law and --

3 THE COURT: Maybe. And it's hard. It's more
4 complicated than that because some things in PACER you can't
5 publish and you have to take account of that and so it's somewhat
6 discretion. Because the FOIA example is not about discretion at
7 all. It's just about an obligation. It was a curation of sorts
8 and you have to decide what can and cannot be published. But that
9 might just be -- okay. It might be the same in PACER. I just
10 don't know.

11 MR. ROYALL: The other thing I know -- just while I have
12 the microphone turned my way -- is we haven't yet talked about --
13 and I want to make sure we don't lose sight of the news media
14 channel as well as an independent basis for this material to be
15 found to constitute public disclosure.

16 THE COURT: I sort of lost sight of it.

17 MR. ROYALL: You lost sight of it? Well, we -- we
18 briefed it --

19 THE COURT: No. I know you did.

20 MR. ROYALL: -- and taken a position. I know that the
21 other side cites I believe an unpublished District Court decision
22 that actually in dicta suggests that something else may not be --
23 constitute news media as published --

24 THE COURT: Well, I actually thought that was a very
25 thoughtful -- thoughtful opinion by a very smart judge. But --

1 but the fundamental question I have is nobody thinks that -- in a
2 practical sense, nobody thinks that the EDGAR site is news media.
3 Nobody. Congress didn't intend that to be news media. Congress
4 didn't intend for PTO's website to be news media.

5 That just doesn't make any sense. And there was a little
6 piece in the judge's analysis that was aimed at that question, is
7 -- it has to actually have something to do with what people would
8 understand to be the language of the statute, not just anything
9 that's out there. Everything on the Worldwide Web is news media?
10 I mean, that's -- that's essentially your argument.

11 MR. ROYALL: Well, no. I don't -- you don't have to go
12 that far to rule for us on that, Your Honor. I agree that the --

13 THE COURT: Any publicly accessible website.

14 MR. ROYALL: Well, that -- the court in the *Integra*
15 case, I think they posed that question because there were -- I
16 think the defendants in that case may have argued maybe more
17 strongly than they needed to --

18 THE COURT: But I don't know -- I don't know where the
19 stopping point is; right? What's the stopping point that is news
20 media that makes the difference for the definition in the --

21 MR. ROYALL: That -- that decision -- and I do agree
22 it's certainly thoughtful or thought-provoking -- the Court
23 suggested there are a few touchstones that you might consider and
24 one is whether information might be considered newsworthy. But it
25 was also quick to say it clearly goes beyond the court in that

1 decision. It clearly goes beyond traditional news outlets. And
2 so that's just how far -- I agree with you that anything on the
3 Internet might be going too far, but you don't need to go nearly
4 that far --

5 THE COURT: Well, but you have to go to any Government
6 website -- any publicly accessible Government website. That's
7 just --

8 MR. ROYALL: That is providing news, updates,
9 information that is noteworthy at least to some audiences.

10 THE COURT: Government's websites all think they're
11 doing that. That's what they do.

12 MR. ROYALL: And perhaps all Government websites would
13 be encompassed. But you don't have to go as far as to -- the
14 websites that are like private, confidential --

15 THE COURT: Okay. Well, take out the confidential ones.

16 MR. ROYALL: -- materials that were at issue in that
17 case.

18 THE COURT: We'll still have an amazing array anywhere
19 on the Worldwide Web of many public websites. They have lots of
20 things. It's just an interesting -- I'd be reluctant to get --
21 you know, to have -- especially when they wrote the word "news
22 media," which those words weren't even -- those are older words.
23 So those aren't 2010 words. Those are -- when was this section
24 drafted?

25 MR. ROYALL: No, but it was -- but Congress updated --

1 THE COURT: Right.

2 MR. ROYALL: -- the statute and did not change those
3 words in 2010.

4 THE COURT: Well, yes, but I -- it's hard to say that
5 they -- it's a little bit of a stretch to say they, therefore,
6 managed -- would sweep in an entire modern understanding of their
7 information that it comes from. Maybe.

8 MR. ROYALL: But we -- but we do agree you don't need to
9 reach that issue. We believe that the Government reports --

10 THE COURT: I think it's a harder issue for you, a much
11 harder issue for you.

12 MR. ROYALL: The Government reports prong we think is
13 more than amply broad as stated in *Schindler* to cover this type of
14 information. And in briefing, Relator has argued that there's
15 something in *Schindler* that suggests that to be a Government
16 report, the information has to -- has to be more actively
17 organized and -- or synthesized by a Government party, but
18 actually that argument was rejected. That was something that the
19 Court of Appeals said that was reversed by *Schindler*. *Schindler*
20 signals a quite broad concept of Government "reports" and we think
21 it's certainly broad enough to encompass the public PAIR database.

22 THE COURT: So can we talk a little bit about original
23 source --

24 MR. SINGH: Yes, Your Honor.

25 THE COURT: -- because that's I think a very hard issue

1 for you.

2 MR. SINGH: Your Honor, we tend to agree that it's a
3 harder issue for us. I think that there are -- so to get at the
4 original source question, I'll say our original source question is
5 arguments are better vis-a-vis Allergan than Adamas, and it
6 depends -- well, it depends a little bit on what you conclude was
7 publicly disclosed if you're going to conclude anything was
8 publicly disclosed.

9 Let me take just a moment to talk about the Adamas argument
10 about the Amneal answer -- let me just run through this. So they
11 submitted this declaration, the Portelli declaration, which had
12 two exhibits on it. These were their information disclosure
13 statements. And the first one is a 202-page document and the last
14 40 or so are just a list of 700 documents that Adamas sent to the
15 PTO. And all it is literally is a list of stuff.

16 So if you look at page 193 of that PDF, you'll find line
17 items 540 and 542 and all they are is the title, you know,
18 Amneal's answer, Amerigen's answer. They don't actually give the
19 allegations of fraud in that document.

20 If on PAIR you try to get documents 540 and 542, you can't do
21 it because on PAIR, those will show up on the docket. They will
22 just be listed as non-patent literature. That's the only
23 information about them. If you click the hyperlink, it will say
24 that's not available on PAIR. You have to petition to get a
25 certified copy of it from the Patent Office if you want it.

1 So if they're going to say that PAIR is where the allegations
2 are publicly disclosed, I think that statement is just honestly
3 flat --

4 THE COURT: Well, so why is that different? So you can
5 get it, though.

6 MR. SINGH: You can --

7 THE COURT: You can get it from the Patent Office. Why
8 does it matter that you can't click on the hyperlink and with
9 respect to some of the documents, you have to write them a letter
10 and get it?

11 MR. SINGH: Well, I would -- I would just say to the
12 extent that their argument --

13 THE COURT: It's more like FOIA.

14 MR. SINGH: Well, only if it was actually gotten that
15 way. I think the argument -- the argument would be, Your Honor, if
16 there was information --

17 THE COURT: No, no. Not -- it's not whether it's
18 actually done that way. It's whether it could be gotten there.

19 MR. SINGH: I'm not sure, Your Honor.

20 THE COURT: It's available from a public source. It
21 doesn't matter how it's actually gotten.

22 MR. SINGH: So, Your Honor, I don't think it is the case
23 that all information in the Government's possession that is
24 potentially retrievable by request counts as information that's
25 been publicly disclosed already. I think after the request is

1 made and the information is retrieved, then you would say it's
2 been publicly disclosed. But -- and that's *Schindler*.

3 THE COURT: So is that right? Is he right? You can't
4 get -- you said the exact opposite in your papers -- that for
5 these exhibits, which are the answer and the counterclaims are
6 accessible on PAIR.

7 MR. HOFFMAN: We didn't say that in our -- he's correct
8 in how he's characterizing --

9 THE COURT: Oh, so they're not accessible.

10 MR. HOFFMAN: They are accessible via PAIR if you get to
11 the non-patent literature. That's still a part of the patent
12 prosecution file. That's a matter of public record. And all you
13 have to do is --

14 THE COURT: Write in for it.

15 MR. HOFFMAN: Write in for it, be online, and there's a
16 nominal fee. I don't know how distinguishable that is from a FOIA
17 response. They all have a nominal fee as well. I don't think
18 that's a relevant --

19 THE COURT: Well, but his point is he says you didn't do
20 that. Well, maybe you did --

21 MR. HOFFMAN: To our knowledge, no one's done that, Your
22 Honor. The question for public --

23 THE COURT: So you didn't do that?

24 MR. SINGH: No, Your Honor.

25 THE COURT: Really. You never --

1 MR. SINGH: I mean, he has looked in the patent
2 prosecution history for sure.

3 THE COURT: Did you look at the complaint and the
4 counterclaim?

5 MR. SINGH: I think he did in connection with the
6 original litigation maybe, but there's no (indiscernible)
7 allegations about that either way. I mean, to the extent that's
8 relevant, Your Honor, that would make this a summary judgment
9 question to talk about later.

10 THE COURT: Well, but I guarantee you if that's what the
11 summary judgment question is, we'll just go ahead and do that
12 summary judgment question.

13 MR. SINGH: No, but I believe he got it from PACER and
14 that's what we would say.

15 THE COURT: Correct.

16 MR. SINGH: And of course I think we'd all agree that
17 PACER is not a qualifying public disclosure -- well, I say it,
18 but --

19 THE COURT: We don't -- you agree with yourself on that.

20 MR. SINGH: Yes.

21 THE COURT: So answer that question then.

22 MR. HOFFMAN: I'm not sure I follow what the question
23 is, but the --

24 THE COURT: The question is so it is available in some
25 sense, but he didn't get it from there.

1 MR. HOFFMAN: That's --

2 THE COURT: And he's not charged with knowledge of
3 everything that is everywhere.

4 MR. HOFFMAN: The statutory touchstone for what serves
5 as a public disclosure bar is whether information was available to
6 the Government to enable them to initiate their own investigation
7 into the wrongdoing. It doesn't matter -- this is the *Graham*
8 *County* case from 2009 from the Supreme Court -- where they are
9 construing this same provision, which said that it doesn't matter
10 -- what matters is what's publicly disclosed, not whether it
11 landed on the desk of a DOJ lawyer.

12 THE COURT: Well, it's a report issue and this is a
13 narrower question. This is a narrower question. This is actually
14 not about public disclosure. This is about whether it's a report.
15 And arguably, everything up on the PAIR website is a report that
16 it's out there, it's published by the Government.

17 MR. HOFFMAN: Right.

18 THE COURT: This is not on the PAIR website.

19 MR. HOFFMAN: And to that, I would respond --

20 THE COURT: And so it's not published by the Government,
21 so it's not a report. That's his argument.

22 MR. HOFFMAN: And my response -- I'm sorry, Your Honor.

23 THE COURT: Go ahead.

24 MR. HOFFMAN: My response to that argument is that
25 Adamas' information disclosure statements which attach that

1 information, that those are federal reports in the same way that
2 an SEC filing is a federal report.

3 THE COURT: Well, so the -- so the IDS, did it have
4 copies of these documents?

5 MR. HOFFMAN: Certainly, and that's required by statute.

6 THE COURT: Well, okay. Well, why isn't that --

7 MR. SINGH: Because, Your Honor, what makes the SEC
8 filing a federal report is not -- it's not the report that gets
9 submitted.

10 THE COURT: So stop it. You're not answering my
11 question. The IDS, the information disclosure statements, have
12 copies of these documents attached; right?

13 MR. SINGH: Yes.

14 THE COURT: And those are available on PAIR?

15 MR. SINGH: No. The attachments are not available on
16 PAIR.

17 THE COURT: So the attachments are not available on
18 PAIR. Why does it matter?

19 MR. HOFFMAN: That's because those submissions to the
20 PTO are a federal report. They're a formal written submission to
21 a federal agency.

22 THE COURT: Yes.

23 MR. HOFFMAN: They give information. They summarize
24 facts for the agency and they're available to the United States
25 Government. That's the question.

1 THE COURT: And do they summarize the fraud in the PTO
2 notice?

3 MR. HOFFMAN: Not only do they summarize the fraud in
4 the PTO -- so, first of all, it's important to understand that an
5 information disclosure statement, its contents are defined by
6 federal regulation.

7 THE COURT: I agree with you with that.

8 MR. HOFFMAN: So the IDS includes both the list and the
9 attachments. That is submitted by Adamas to --

10 THE COURT: Okay, but the attachments are not available
11 on PAIR, just the list; right?

12 MR. HOFFMAN: That is correct and some of the
13 attachments but not the attachments that include the express
14 allegations of fraud that are at issue here.

15 THE COURT: Right, but so you have to drill down if
16 you're relying on the IDS. If you wanted to see it, you'd have to
17 drill down the attachments; right? It's not in the list.

18 MR. HOFFMAN: They're on the list.

19 THE COURT: I understand that.

20 MR. HOFFMAN: But they're attached to the document.

21 THE COURT: The allegations of fraud are not on the
22 list.

23 MR. HOFFMAN: That's correct. The documents are
24 attached as part of the IDS, and I should mention that there is a
25 requirement -- 37 CFR 1.97, "An IDS and its attachments shall be

1 considered by the Office." This is also what distinguishes this
2 situation from the PACER database. The Patent Office is obligated
3 -- legally required to review the IDSs that we submitted. It put
4 them fully on notice --

5 THE COURT: And they did.

6 MR. HOFFMAN: And they did. They certified to it and
7 that's -- he is obviously -- he was referring to the documents
8 that were mentioned earlier. That's not true about PACER. There
9 is no requirement that anyone in the Federal Government will sit
10 down and read everything on PACER. That's the -- that's what
11 distinguishes this.

12 THE COURT: Well, it was distinguished -- it's
13 different. But why is it different within the meaning of the case
14 law about what a report is?

15 MR. HOFFMAN: Well, a "report's" been defined broadly
16 that it could be anything that gives information. And -- and all
17 of the case law that has looked at this question -- if you -- case
18 law is uniform, Your Honor.

19 THE COURT: But they haven't required the Government
20 look at the documents to make the report, so that --

21 MR. HOFFMAN: No, that's -- this is an easier case.
22 This is much easier.

23 THE COURT: Well, I don't know easier. If it doesn't
24 matter, it doesn't matter. If it's irrelevant whether or not the
25 Government looked at it, it's not an easier case or a harder case.

1 It's irrelevant.

2 MR. HOFFMAN: Well, it's relevant to whether -- you
3 know, I think what was in Congress's mind, if you're going to go
4 beyond the plain, unambiguous text of a statute, like a federal
5 report -- a federal report as defined by the *Schindler* case, and
6 you're going to start to consider whether Congressional intent in
7 amending subsection (i) of the public disclosure bar influences
8 the text of (ii), then you have to look at Congressional intent.

9 But Congress's intent was to make sure that these provisions
10 were striking the right balance to make sure that the Government
11 was actually being put on notice or had an opportunity to see the
12 information. That's what matters. That's why they changed
13 subsection (i) because there was insufficient assurances that the
14 Federal Government would actually be looking at cases on PACER or
15 civil litigation matters where they weren't a party.

16 You don't have that concern with public PAIR. You don't have
17 that concern with an IDS.

18 THE COURT: Well, so I don't understand that because the
19 Federal Government is a party to every federal criminal case. The
20 Federal Government is -- is involved in every federal
21 administrative hearing, every federal administrative hearing.

22 So I guess I'm not really understanding what you're saying.

23 MR. HOFFMAN: I'm saying that Congress -- I don't think
24 we need to ever even consider the changes that were made to
25 subsection (i). I'm considering subsection (ii) --

1 THE COURT: No. I understand that.

2 MR. HOFFMAN: -- because Congress would have amended it
3 if they wanted to change its scope after the *Schindler* case. But
4 if you are going to consider Congressional intent and whether the
5 Congressional intent in amending one subsection of the statute
6 impacts another seemingly less unrelated subsection of the
7 statute, what was important to Congress was, you know, Are we
8 calibrating this public disclosure source to give us adequate
9 assurances that someone in the Government might actually run
10 across this information.

11 And so with subsection (ii) with these IDS reports where
12 there's a federal regulation that says, You, Federal Government,
13 you, Patent Office, must read these, I think that's relevant to
14 determining what Congress's intent was and it's probative of why
15 you shouldn't even -- that this intent argument about how Congress
16 kind of backdoor amended the scope of the report prong is
17 misguided.

18 THE COURT: Okay. So we sort of got sidetracked here.

19 MR. SINGH: Yeah, so --

20 THE COURT: Back to the original source.

21 MR. SINGH: Right. So just to fill that out, I mean, I
22 think part of the question is whether you conclude that those
23 allegations in the IDSs were publicly disclosed. We don't think
24 they were.

25 THE COURT: Okay. If they were --

1 MR. SINGH: If they were, then I don't think we have a
2 very good original source argument vis-a-vis those allegations.

3 THE COURT: All right.

4 MR. SINGH: Federal.

5 THE COURT: Right.

6 MR. SINGH: Our original source argument comes down to
7 an argument that I'll admit is against the weight of the pre-
8 amendment precedent --

9 THE COURT: Right.

10 MR. SINGH: -- which is that the application of
11 expertise can in some circumstances make somebody an original
12 source.

13 THE COURT: Yes.

14 MR. SINGH: The change Congress made to the statute in
15 2010 was they took the word "direct" out. You no longer need to
16 have direct knowledge of the fraud. You need independent
17 knowledge that materially adds. And by taking out "direct,"
18 specifically what Congress was trying to do was open up the False
19 Claims Act to people who didn't have firsthand knowledge -- more
20 outsiders than similar.

21 THE COURT: Well, but that means it does -- it still has
22 to be independent of the publicly available source. And that's
23 where I think the flaw is in your argument.

24 MR. SINGH: So I think --

25 THE COURT: Just because you've got some smart patent

1 lawyer who can read a patent file, you know, there's a million of
2 those people.

3 MR. SINGH: Your Honor, that's -- that's correct. I
4 really think the "There's a million of those people" line of
5 thought is exactly what -- what matters here because that comes to
6 whether it materially adds to what's in the public domain. And I
7 think that -- so that's a decision you would have to make.

8 THE COURT: No. It's just that I don't think --

9 MR. SINGH: But, Your Honor, we're acknowledging this is
10 a difficult argument and I don't want to press it too hard. We do
11 think, though, that we have a very strong rifle shot argument that
12 this was not publicly disclosed because PAIR --

13 THE COURT: Well, I think (indiscernible) and I think --
14 I think it's the hardest piece.

15 Okay. Anything else you want to talk to me about because
16 that's all I wanted to talk about.

17 MR. HOFFMAN: Can I add something on original source?

18 THE COURT: Oh, yeah. Sure. Sure. You're winning that
19 argument, so --

20 MR. HOFFMAN: Well, I would just point out that --

21 THE COURT: Discretion may be the better part of --

22 MR. HOFFMAN: Well, I'm going to just say, since I'm
23 already out on this plank, --

24 THE COURT: Go ahead.

25 MR. HOFFMAN: -- that there are courts that have come

1 down and interpreted the public disclosure bar and the original
2 source exception since it was amended and they continue to hold
3 that -- you know, that your specialized expertise and your subject
4 matter expertise isn't enough to make you an original source.

5 MR. ROYALL: If I could add one thing on the original
6 source.

7 THE COURT: Yes.

8 MR. ROYALL: Sean Royall for the Allergan Defendants.
9 Just -- we do think this is straightforward. We think really Your
10 Honor can be guided by two Ninth Circuit decisions. We have the
11 *Amphastar* case that says independent -- clearly, it has meaning.
12 And what it means is that the relevant information -- the Relator
13 had the relevant information before the public disclosure. That's
14 not something that Relator can satisfy, but it's fairly notable
15 that Relator does not address the independent requirement of their
16 original source in briefing at all.

17 Relator ignores that and we think that's because there's not
18 a -- there's not a basis to satisfy the Ninth Circuit law
19 requirement.

20 THE COURT: That's a difficult argument.

21 MR. ROYALL: And then the other case is just the A-1
22 *Ambulance* case, and I know that Mr. Singh is being very
23 forthcoming about their argument, but their argument is that
24 somehow that -- because they concede that under A-1 *Ambulance* and
25 that law, they lose on this. And so they -- they want to argue

1 that somehow the 2010 amendments make that no longer good law, but
2 we don't -- there's not a basis for that argument and they wish it
3 were so, but we don't think it's correct and the other circuit
4 courts have continued to hold that expertise is -- is not enough
5 to -- as I understand their argument, they're not very direct
6 about it, but what they're trying to suggest is that they can
7 satisfy the "materially adds" language from the amended original
8 source exception by pointing to expertise.

9 But the statute as revised says that the Relator must have
10 knowledge that is independent of and materially adds to the
11 publicly-disclosed allegations or transactions. They're not
12 referring here to expertise in patent law. They're talking about
13 facts, knowledge of facts, material knowledge that adds to the
14 basis of the facts, and there's nothing -- nothing here. They're
15 not suggesting that at all. They're just referring to his legal
16 expertise.

17 THE COURT: Uh-huh. Mr. Singh, did you want to add
18 anything?

19 MR. SINGH: Yeah. So I think the -- on that point, Your
20 Honor, I think -- they're framing the debate exactly correctly.
21 It is about whether you would regard expertise as a form of
22 independent knowledge that materially adds. And within the
23 statute when they changed that, we understand it's a hard
24 argument.

25 I want to go to I think the over-arching frame of just where

1 we close this question of the public disclosure bar. You know, in
2 some cases -- and it looks like in this one -- it can kind of
3 become the tail that wags the dog a little bit and it's important
4 to recognize, I think, when you look at what Congress was trying
5 to do in 2010 broadly, this was amendments done as part of the
6 Patient Protection and Affordable Care Act. Fraud in the
7 healthcare sector was a highly salient concern and Congress's
8 objective was bring more of these suits. Get more of this
9 litigation in, which is why they lowered the bar. They made other
10 amendments to the Act as well, but this is why they narrowed the
11 scope of the public disclosure bar.

12 And so when you're looking -- these arguments about purpose
13 and about striking the balance, that's partially correct. But --
14 and this is an important part of the story -- which is that in
15 these specific amendments, Congress had one objective. Get more
16 of these cases in, and that was including by narrowing the scope
17 of the hearings that were going to qualify and it must follow we
18 think, as Judge Gutierrez very precisely points out, that you
19 can't undo that narrowing through romanette (ii) or romanette
20 (iii). And I think that that's just a critically important
21 argument.

22 And I will say also there's a framing that goes on in some of
23 these cases that I find to be -- to be really rather unfortunate,
24 which is the tendency to call the Relator a parasite and an
25 opportunist. And I will just point out that in order to make any

1 money out of any case like this, first we must show that the
2 Defendants defrauded the Federal Government and took money to
3 which they were not entitled. And so I find that, you know, it's
4 a challenging frame to be in the position of having to sort of
5 defend the character of someone who's been an honest person his
6 whole life and who has found fraud and brought a claim to address
7 that fraud on the Government's behalf.

8 You know, I think it's important to keep in mind that
9 Congress also understands these issues that way and that's what it
10 was doing in 2010.

11 THE COURT: I have no problem with Relators bringing
12 these case. I have no problem with the Relator bringing this
13 case. The question is whether the statute allows it. Sole
14 question.

15 MR. SINGH: That's exactly correct, Your Honor, and we
16 think Congress intended to allow it.

17 THE COURT: Sole question. I don't think they do, they
18 don't. I don't get -- you know, my moral judgments, I leave them
19 at the door -- most of the time.

20 So -- anything else anyone would like to add on any subject?

21 MR. HOFFMAN: (Inaudible) Judge Gutierrez's case, I
22 believe that was certified interlocutory (inaudible) small -- a
23 minority of --

24 THE COURT: Well, --

25 MR. HOFFMAN: (Inaudible).

1 THE COURT: The Ninth Circuit took --

2 MR. HOFFMAN: The Ninth Circuit (inaudible).

3 THE COURT: All right. But it went -- how long ago did
4 they take it?

5 MR. HOFFMAN: It just happened.

6 THE COURT: It just happened.

7 MR. SINGH: In the last --

8 MR. HERRERA: November 20.

9 THE COURT: Ah, so they'll decide it November '20, next
10 year, if we're lucky. Okay. Well, we can't wait that long.
11 Well, thank you very much. It was a really interesting case and
12 it was really an interesting argument and it's unfortunate that
13 you're all such great lawyers because it makes me not want to
14 dismiss the case, but I'll do it if I have to.

15 MR. SINGH: You don't have to.

16 THE COURT: I'm going to decide this before we do. I'm
17 going to stay all discovery until I decide this, but we're going
18 to decide this pretty quickly. If I deny the motion, then I'll
19 open discovery and we'll set a schedule and get it all done.

20 MR. SINGH: Thank you, Your Honor.

21 THE COURT: But I'm going to do this first.

22 ALL: [Thank you, Your Honor.]

23 THE COURT: Thank you.

24 THE CLERK: Court stands in recess.

25 //

1 (Proceedings adjourned at 3:43 p.m.)

2
3 I, Peggy Schuerger, certify that the foregoing is a
4 correct transcript from the official electronic sound recording
5 provided to me of the proceedings in the above-entitled matter.

6
7 

8 Signature of Approved Transcriber

December 31, 2019

Date

9 Peggy Schuerger

Ad Hoc Reporting

10 Approved Transcription Provider
11 for the U.S. District Court,
Northern District of California

12
13
14
15
16
17
18
19
20
21
22
23
24
25